

OCT-13 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF OHIO,
v. *Appellant,*
AKRON CENTER FOR REPRODUCTIVE HEALTH,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

JANE HODGSON, M.D., *et al.*,
Petitioners and Cross-Respondents,

v.

THE STATE OF MINNESOTA,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**BRIEF OF AMICI CURIAE IN SUPPORT OF HODGSON
CROSS-RESPONDENTS AND AKRON APPELLEE FOR
13 INDIVIDUAL MEMBERS OF THE PANEL ON
ADOLESCENT PREGNANCY AND CHILDBEARING OR
THE COMMITTEE ON CHILD DEVELOPMENT
RESEARCH AND PUBLIC POLICY**

(Complete list of *amici curiae* appears on inside cover)

HANNAH E.M. LIEBERMAN
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000

October 14, 1989

Attorneys for Amici Curiae

LIST OF REPRESENTED AMICI

Panel Members

Ezra C. Davidson, Jr.

Joy G. Dryfoos

Daniel D. Federman

Jacqueline Darroch Forrest

Frank F. Furstenberg, Jr.

Richard Jessor

Judith E. Jones

Committee Members

Eugene S. Bardach

Herbert P. Ginsburg

William Kessen

John Modell

Barbara Starfield

Carol K. Whalen

TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITIES | ii |
| DESCRIPTION AND INTEREST OF <i>AMICI CURIAE</i> | 2 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 6 |
| I. INTRODUCTION | 6 |
| II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION | 7 |
| III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS | 11 |
| A. The Psychological Considerations | 11 |
| B. The Counseling Considerations | 14 |
| IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS | 16 |
| A. Notification Requirements Result In Delays Which May Lead to Increased Health Risks.. | 16 |
| B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities | 19 |
| CONCLUSION | 21 |

TABLE OF AUTHORITIES

| CASES: | Page |
|---|----------------|
| <i>Akron Center for Reproductive Health v. Slaby, et al.</i> , 854 F.2d 852 (6th Cir. 1988) | 19 |
| <i>Bellotti v. Baird</i> , 428 U.S. 132 (1976) | 15 |
| <i>Bellotti v. Baird</i> , 443 U.S. 622 (1979) | 6 |
| <i>Carey v. Population Services International</i> , 431 U.S. 678 (1977) | 6 |
| <i>H.L. v. Matheson</i> , 450 U.S. 398 (1981) | 6, 11, 12 |
| <i>Hodgson v. Minnesota</i> , 648 F.Supp. 756 (D.Minn. 1986) | 17, 18, 19, 20 |
| <i>Planned Parenthood Association of Kansas City v. Ashcroft</i> , 462 U.S. 476 (1983) | 6 |
| <i>Planned Parenthood of Central Missouri v. Danforth</i> , 428 U.S. 52 (1976) | 6, 15 |
| <i>Roe v. Wade</i> , 410 U.S. 113 (1973) | 6 |

STATUTES:

| | |
|---|--------|
| Minn. Stat. § 133.343 (1988) | 14, 18 |
| Ohio Rev. Code Ann. § 2919.12(B) (1) (a) (i) (1989) | 18 |

MISCELLANEOUS:

| | |
|--|--------|
| Adler & Dolcini, <i>Psychological Issues in Abortion for Adolescents in Adolescent Abortion: Psychological and Legal Issues</i> (G. Melton ed. 1986) | 12 |
| Alan Guttmacher Institute, <i>Teenage Pregnancy: The Problem That Hasn't Gone Away</i> (1981) .. | 17, 19 |
| Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l) | 13 |
| Ambuel & Rappaport, Developmental Change in Adolescents Psychological and Legal Competence Consent to Abortion (1989) (Paper presented at American Psychological Association Convention) | 13 |

TABLE OF AUTHORITIES—Continued

| | Page |
|--|--------|
| APA Interdivisional Committee on Adolescent Abortion, <i>Adolescent Abortion, Psychological and Legal Issues</i> , 42 Am. Psychologist 73 (1987) | 13 |
| Blum, Resnick & Stark, The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking (1985) (Unpublished manuscript, University of Minnesota) | 10 |
| Chamie, Eisman, Forrest, Orr & Torres, <i>Factors Affecting Adolescents' Use of Family Planning Clinics</i> , 14 Fam. Plan. Persp. 126 (1982) | 10 |
| National Research Council, <i>Risking the Future, Adolescent Sexuality, Pregnancy and Childbearing</i> , Vol. I (1987) | passim |
| Orr, <i>Private Physicians and the Provision of Contraceptives to Adolescents</i> , 16 Fam. Plan. Persp. 83 (1984) | 14 |
| Rosen, <i>Adolescent Pregnancy Decision-making: Are Parents Important?</i> , 15 Adolescence 43 (1980) | 9 |
| Steinhoff, <i>Premarital Pregnancy and the First Birth</i> (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of larger study, Hawaii Pregnancy, Birth Control and Abortion Study, Univ. of Hawaii) | 9 |
| Torres, Forrest & Eisman, <i>Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services</i> , 12 Fam. Plan. Persp. 284 (1980) | 8, 9 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-805

STATE OF OHIO,

v.

Appellant,

AKRON CENTER FOR REPRODUCTIVE HEALTH,
Appellee.

On Appeal from the United States Court of Appeals
for the Sixth Circuit

Nos. 88-1125 and 88-1309

JANE HODGSON, M.D., *et al.*,
Petitioners and Cross-Respondents,

v.

THE STATE OF MINNESOTA,
Respondents and Cross-Petitioners.

On Writs of Certiorari to the United States Court of Appeals
for the Eighth Circuit

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF HODGSON
CROSS-RESPONDENTS AND AKRON APPELLEE FOR
13 INDIVIDUAL MEMBERS OF THE PANEL ON
ADOLESCENT PREGNANCY AND CHILDBEARING OR
THE COMMITTEE ON CHILD DEVELOPMENT
RESEARCH AND PUBLIC POLICY**

DESCRIPTION AND INTEREST OF *AMICI CURIAE*

Amici are individuals who were members of either the Panel on Adolescent Pregnancy and Childbearing ("Panel") or the Committee on Child Development Research and Public Policy ("Committee") of the National Research Council.¹ Seven members of the Panel and six members of the Committee are *amici* here.²

The Committee on Child Development Research and Public Policy is an interdisciplinary body within the National Research Council. In 1983, the Committee established an expert, interdisciplinary panel to study the problems of adolescent pregnancy and childbearing.³ The study was initiated, in part, to correct a perceived imbalance between general beliefs about the problems associated with adolescent sexuality and the scientific and other empirical data that had been collected about those issues. *Risking the Future* at ix-x.

The Committee selected Panel members who could bring a diverse range of expertise, experience, and political and philosophical points of view to the study. *Id.* at x. These Panel members included physicians, psychologists, professors of medicine, social scientists, a professor of law, an historian, and an economist. *Id.* at iii-iv.

¹ The National Research Council is the principal operating agency of both the National Academy of Sciences and the National Academy of Engineering in the conduct of their services to the government, the public, and the scientific and engineering communities.

² This brief is filed on behalf of the listed *amici* as individuals, not on behalf of the Panel (which was disbanded in 1986 upon completion of its study), the National Research Council or the National Academy of Sciences.

³ National Research Council, *Risking the Future, Adolescent Sexuality, Pregnancy, and Childbearing*, Vol. I at x (1987) (hereinafter cited as "*Risking the Future*").

The Panel members are authors of numerous textbooks, scholarly articles, and research reports in the areas of medicine, science, sociology, adolescent development and sexuality, and child psychology and are affiliated with over twenty universities (including law and medical schools) and research institutes. Many of the institutions and organizations with which the Panel members are affiliated have a specific focus on children and adolescents.

The Panel was charged with a three-fold mission: (1) to collect, integrate and evaluate data on trends in teenage sexual behavior; (2) to review and synthesize research on the antecedents and consequences of adolescent pregnancy and childbearing; and (3) to review and assess alternative preventive and ameliorative policies and programs. *Id.* at x. Over a two-year period, the Panel studied the initiation of sexual activity among adolescents, contraceptive use, pregnancy, pregnancy resolution, and the consequences of teenage pregnancy, childbearing, and parenting as well as the cost and effectiveness of policies and programs designed to address those areas. *Id.*⁴

In conducting its study, the Panel acknowledged that the issues surrounding adolescent pregnancy are both complex and controversial. As a scientific body, the Panel sought to "clarify the issues, sharpen awareness of crucial decision points, and define limits of existing knowledge" without injecting moral, philosophical or political ideology into its report. *Id.* at xi. The Panel's objective was "to inform the policy debate by clarifying the scientific issues." *Id.* at 5.

⁴ Five private foundations, the Rockefeller Foundation, the Ford Foundation, the William and Flora Hewlett Foundation, the Robert Wood Johnson Foundation, and the Charles Stewart Mott Foundation provided support for the study. *Id.* at x, xiii.

Risking the Future, Vol. I (1978), is the Panel's final report.⁵ In the report, the Panel members unanimously endorsed three comprehensive policy goals, within which they set forth specific conclusions and recommendations. *Id.* at 5. In order of priority, the Panel's primary goals were to:

- (1) Reduce the rate and incidence of unintended pregnancy among adolescents, especially among school-age teenagers;
- (2) Provide alternatives to adolescent childbearing and parenting;
- (3) Promote positive social, economic, health, and developmental outcomes for adolescent parents and their children.

Consistent with its overall approach, the Panel studied information regarding the availability of abortion services to adolescents in a non-ideological context. While the Panel stressed that it "strongly prefers prevention of pregnancy to avoid parenthood," it recognized that abortion is a legal alternative for adolescents for whom pregnancy prevention fails and devoted some attention to the issues associated with pregnancy termination. *Id.* at 6.

As individual members of the Panel or the Committee, *amici* wish to direct this Court's attention to the conclusions set forth in *Risking the Future* and the studies described therein. Specifically, the undersigned *amici* believe that the data reviewed by the Panel and the conclusions that can be drawn therefrom may provide the

⁵ Before it was issued, *Risking the Future* was reviewed by several independent bodies, including the Committee, the review board of the Commission on Behavioral and Social Sciences and Education, a report review committee of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine, and a number of independent, outside reviewers.

Court with relevant empirical evidence which will assist it in its examination of the parental notification provisions that are currently before the Court.

SUMMARY OF ARGUMENT

There is no empirical evidence that mandatory parental notification provisions foster parent-child communications about abortion. Many teenage girls voluntarily choose to inform one or both parents about an unwanted pregnancy. Teenagers who do not wish, for whatever reason, to consult with their parents, go to great lengths to avoid complying with statutes that would require them to do so. There is no basis for concluding that the interests of these minors are well-served by the notification statutes that are intended to protect them.

There also is no scientific evidence that pregnant minors are especially vulnerable to psychological harm from an abortion, are unable to make a reasoned decision about whether to obtain an abortion or are more likely than adults to suffer adverse medical consequences from an abortion. There is, however, empirical data that indicates that parental notification requirements increase the likelihood that a pregnant teenager will delay obtaining an abortion. Teenagers appear to suffer a disproportionate burden from such delay, including, in some cases, postponement of abortions until the second trimester, when health risks increase. Thus, a fair reading of the available empirical data tends to indicate that parental notification requirements actually may harm pregnant minors without conferring substantial off-setting benefits.

ARGUMENT

I. INTRODUCTION

Since 1973, abortion has been a legal option for all women in the United States. Pregnant minors, as well as adult women, have a constitutionally protected right to choose to have an abortion, for "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976). Nevertheless, the circumstances under and the manner in which minors may take advantage of their legal option to terminate an unwanted pregnancy have remained special and emotional issues for policy makers and the courts. See *Risking the Future* at 9. The perception that a minor's decision to obtain an abortion raises unique emotional, health or family-interest issues has spawned legislation specifically regulating the manner in which minors may obtain abortion services. See generally *Planned Parenthood Association of Kansas City v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Such regulations often are based on the articulated goals of promoting the emotional and physical welfare of the minor and the state's interest in intra-family harmony and unity. See, e.g., Brief of Cross-Petitioners, State of Minnesota, *et al.* at 22-34 (hereinafter "Minn. Br."); Brief of Appellant, State of Ohio at 24 (hereinafter "Ohio Br."). When state regulations impinge upon a constitutionally protected right, however, they must be narrowly tailored to serve a legitimate state interest. *Carey v. Population Services International*, 431 U.S. 678, 686, 688 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

No one, including *amici*, would quarrel with the laudable goals of promoting family communication and pro-

tecting pregnant minors. It is the opinion of these *amici*, however, that these articulated goals are not well-served by the forced intervention of parents or the state into the abortion decision. In the opinion of these *amici*, the doubtful efficacy of notification requirements, particularly when weighed against the burdens they impose on a minor's right to obtain an abortion, raises serious constitutional questions.

These *amici* believe that the comprehensive study of adolescent pregnancy set forth in *Risking the Future* brings a unique and empirically-based perspective to these controversial issues. On the basis of the available data, the *Risking the Future* Panel concluded that parental involvement in an adolescent's decision to seek an abortion should not be mandated; that "minor adolescents should be encouraged, but not required, to involve their parents and partners in the decision-making process." *Risking the Future* at 9-10, 278-79. The Panel's conclusion was based on two subsidiary findings—the lack of a scientific basis for restricting the availability of abortion to adolescents and the delay and attendant health risks which often accompany parental consent requirements. *Id.* As set forth below, it is the opinion of *amici* that the findings set forth in *Risking the Future* and described herein cast grave doubts on the effectiveness and desirability of such restrictions.

II. PARENTAL NOTIFICATION REQUIREMENTS FOR MINORS SEEKING ABORTIONS ARE UNLIKELY TO PROMOTE CONSTRUCTIVE PARENT-CHILD CONSULTATION

A purported purpose of both Minnesota and Ohio's parental notice requirements is the furtherance of parent-child communication. See, e.g., Minn. Br. at 4; Ohio Br. at 24. *Amici* share the view that communication between adolescents and their parents is important and may have salutary effects on many aspects of adolescent sexual be-

havior.⁶ Indeed, the Panel concluded that adolescents should be encouraged to involve their parents in the process of pregnancy testing and counseling, *Risking the Future*, at 279, in decision-making with respect to pregnancy resolution options, *id.*, see also *id.* at 281, and in decisions concerning childrearing for those minors who become parents. *Id.* at 286-37.

However, the empirical evidence analyzed by the Panel does not support the proposition that compulsory parental notification will make an appreciable difference in parent-child communications concerning an abortion decision. With or without compulsory notification requirements, parental attitudes about abortion appear to have a significant influence on a pregnant minor's decision to terminate a pregnancy. *Id.* at 113. The data compiled by the Panel indicates that "[m]ost school-age adolescents, especially very young teenagers, consult their parents in deciding to obtain an abortion." *Id.* at 114. For example, in one study,⁷ a majority of the 1,170 un-

⁶ However, there is little scientific evidence as to the actual effects of parent-child communication on adolescent decisions regarding sexual activity. Research on the effects of parent-child communication on sexual topics "has produced conflicting and inconclusive results." *Risking the Future* at 245-46; see also *id.* at 102-04, 149, 150. Although school- and community-based family planning programs reflect increasing efforts to involve parents, there is limited evidence upon which the effectiveness of these approaches may be measured. *Id.* at 145-46. The Panel stressed that "there is little scientific basis for understanding how these [communication-enhancement programs] are likely to affect teenagers' decisions to delay initiation of sexual activity or to be more diligent contraceptive." *Id.* at 246. While there is evidence that close parent-child relationships may be associated with less sexual activity among younger teenagers, *id.* at 103, this may not be true with respect to older minors. *Id.* Other analyses have not been able to establish a correlation between parent-child communication and the sexual activity of the child. *Id.* at 103.

⁷ Citing Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services* 12 Fam. Plan. Persp. 284 (1980) ("Torres").

married, minor abortion patients under the age of 18 surveyed indicated that their parents knew that they were obtaining an abortion. *Id.* at 192. Among very young teenagers, parental influence is particularly strong. *Id.* at 113.⁸ Survey data suggests that the younger the patient, the more likely she was to report that her parents knew that she was seeking an abortion and the more likely it was that she was referred to the abortion clinic by her parents. *Id.* at 192.⁹

Indeed, adolescents tend to involve their parents in other areas pertaining to sexual activity even in the absence of parental notification requirements. For example, data indicate that 59% of teenagers seeking contraceptive services from clinics or other organized providers "are sure" or "think" their parents know of their intentions. *Id.* at 158. Of this group, a majority voluntarily told their parents, while for most of the others—and particularly in the case of girls 15 and under—their parents suggested the visit. *Id.*

However, the evidence also suggests that those adolescents who do not voluntarily consult with parents about abortion or other issues relating to their sexual activity probably would continue to avoid such notification, even were it legally required. In the case of abortion decisions, the Panel noted that approximately 25 percent of the teenagers surveyed in the Torres study said their parents did not know of their decision to terminate their pregnancy "and that they would not have come to the clinic if parental consent or notification were required."

⁸ Citing Steinhoff, *Premarital Pregnancy and the First Birth* (1976) (Paper presented at the Conference on the Birth of the First Child and Family Formation, Pacific Grove, CA. Report on part of a larger study, Hawaii Pregnancy, Birth Control and Abortion Study. University of Hawaii); Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 *Adolescence* 43 (1980).

⁹ Citing Torres, n.7, *supra*.

Id. at 192. A study reviewed by the Panel of the impact of Minnesota's parental notification requirement—the very statute at issue in *Hodgson*—similarly indicated that a sizeable minority of pregnant minors seeking abortions avoid notification requirements. *Id.*¹⁰ Approximately 43 percent of adolescent minors surveyed in the Minnesota study took advantage of the judicial bypass alternative to parental notification instead of informing both parents of their desire to obtain an abortion; about a quarter of these minors reported having notified one parent. *Id.* at 192.

Similarly, among the substantial minority (41%) of teenagers surveyed who sought contraceptive services but did not tell their parents, a majority say they would not have come to a clinic if parental notification were required. *Id.* at 159.¹¹ Moreover, the second most common reason teenagers choose a family planning clinic rather than a private physician for contraceptive services, according to one study, is to ensure privacy. *Id.* at 160 (26% of adolescents went to clinics over private doctors because they feared doctors would tell their parents; 65% made the decision on the basis of cost).¹² See also *id.* at 273.

A reluctance to tell their parents also causes adolescents to postpone pregnancy testing, *id.* at 173, or, for those who choose to carry their child to term, to delay prenatal care. *Id.* at 198. Such delay is undesirable and

¹⁰ Citing Blum, Resnick & Stark, *The Impact of a Parental Notification Law on Adolescent Abortion Decisionmaking* (1985) (Unpublished manuscript, University of Minnesota).

¹¹ Some teens in the latter group would have foregone contraception entirely if required to tell their parents, *Risking the Future* at 159, thus substantially increasing the risk of an unintended pregnancy.

¹² Citing Chamie, Eisman, Forrest, Orr, & Torres, *Factors Affecting Adolescents' Use of Family Planning Clinics*, 14 *Fam. Plan. Persp.* 126 (1982).

dangerous both for teenagers who choose to carry their child and for those who ultimately decide to terminate the pregnancy. See *infra* at 16-20.

In sum, a majority of adolescents involve their parents in many decisions relating to their sexual activity, including, but not limited to, abortion. Younger adolescents are particularly likely to consult and be guided by their parents. However, a significant minority will avoid parental notification when such notification is required, often choosing to forego or delay seeking services instead of involving their parents. This evidence indicates to *amici* that parental notification statutes are unlikely to foster parent-child communication beyond that which already occurs voluntarily.¹³

III. THE CHALLENGED NOTIFICATION STATUTES DO NOT FURTHER ANY DOCUMENTED SIGNIFICANT PSYCHOLOGICAL OR COUNSELING NEED OF ADOLESCENTS

A. The Psychological Considerations

Among the justifications Minnesota and Ohio offer for the challenged statutes are that notification may, in various ways, ameliorate alleged adverse psychological consequences of an abortion. See, e.g., Minn. Br. at 13-15; Ohio Br. at 46. In the opinion of these *amici*, such concerns are not based on scientific fact.

¹³ Pregnant minors are not a monolithic group. *Risking the Future* at 2, 19. See also *H.L. v. Matheson*, *supra*, 450 U.S. at 419 (1981) (concurring opinion) ("When a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, her relationship with her parents, and the like."). For this reason parental notification requirements affect different minors in different and possibly unpredictable ways. Broad-brush legislation, including the Ohio and Minnesota statutes at issue here seem, to these *amici*, particularly ill-suited to address such an inherently individualized and idiosyncratic issue.

At the time the Panel undertook its analysis, there were few studies of the psychological effects of abortion on adolescents, *Risking the Future* at 195, and most did not distinguish between adolescents and adults. *Id.* at 244. While a very few of the studies found that abortion had a slight but measurably more negative effect on the short-term emotional well-being of teenagers than on adult women, *id.* at 196, 244, most studies indicated that the abortion experience is simply not likely to cause severe emotional problems. *Id.*¹⁴ One study suggested that the negative reactions of teenagers to an abortion (primarily depression) are generally mild.¹⁵ Indeed, for all women, including teenagers, a frequent reaction to having an abortion is relief. *Id.* at 195.

After examining the available data, the Panel concluded that existing research simply does not support the assumption that minors are especially likely to experience adverse psychological reactions to an abortion. *Id.* at 277 ("On the basis of existing research . . . the contention that adolescents . . . are especially vulnerable to serious psychological harm as a result of an abortion is not supported.") In particular, scientific research has not shown

¹⁴ At least some of the few studies which suggested that there may be measurable differences in the short-term emotional well-being of adult women and adolescents following an abortion did not control for other potentially explanatory variables, such as the timing of the procedure. *Id.* at 244. Other factors, which may contribute to the slight differences in effect include gestational age, delay and social support. *Id.* at 196.

These studies cast serious doubt on the assumption articulated in *H.L. v. Matheson*, that "[t]he medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature." 450 U.S. at 411. Significantly, the studies upon which the *Matheson* court relied, *id.* at n.20, pre-date those examined by the Panel by at least a decade.

¹⁵ Citing Adler & Dolcini, *Psychological Issues In Abortion for Adolescents in Adolescent Abortion: Psychological and Legal Issues* (G. Melton ed. 1986).

that mandated parental involvement helps adolescents cope with their decision to have an abortion. *Id.*¹⁶ Similarly, the Panel found that the concern that adolescents are unlikely or unable to make well-reasoned conclusions lacks empirical support. *Id.* Given the absence of evidence to support or refute the belief that adolescents lack the cognitive capacity to make rational decisions about pregnancy termination, *id.* at 9, the Panel concluded that there is no scientific basis for restricting the availability of abortion on the basis of age. *Id.*

What the evidence does show is that confidentiality is a factor in a minor's choice of abortion providers. *Id.* at 279. ("Factors of cost and confidentiality lead most teenagers to clinics for [abortion] services."). The need to protect the confidentiality of an adolescent's decision to seek health care services relating to sexual activity has been widely recognized. At the time *Risking the Future* was written, 29 other states and the District of Columbia specifically allowed minors to give their own consent for family planning services. *Id.* at 157. The same sensitivity to the privacy interests of minors causes the vast majority of contraceptive providers to provide services to adolescents, particularly to teenagers over 15, without the

¹⁶ Since the Panel completed its work, more recent studies have been conducted, the results of which appear to be consistent with the findings of the Panel. See, e.g., Brief for *Amici Curiae* American Psychological Association, et al., filed September 1, 1989, citing Ambuel, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion: An Empirical Study and Quantitative Model of Social Policy (1989) (Dissertation Abstracts Int'l); Ambuel & Rappaport, Developmental Change in Adolescents' Psychological and Legal Competence to Consent to Abortion (1989) (Paper presented at American Psychological Association Convention); APA Interdivisional Committee on Adolescent Abortion, *Adolescent Abortion, Psychological and Legal Issues*, 42 Am. Psychologist 73 (1987). Neither these amici as individuals, nor the Panel as a group, have independently reviewed these subsequent studies.

minor's parents' consent.¹⁷ *Id.* at 155-56. Indeed, the Minnesota legislature has expressly relieved minors of the need to obtain parental or other adult consent "for medical, mental and other health services to determine the presence of or to treat pregnancy and conditions associated therewith, venereal disease, alcohol and other drug abuse." Minn. Stat. § 144.343 (1988).

The Panel recognized that the preservation of confidentiality is important to adolescents seeking assistance with respect to choices concerning their sexual behavior. *See, e.g., Risking the Future* at 8, 169, 170. It stressed the importance of privacy in every aspect of adolescent decision-making related to their sexual activity, emphasizing that "the girl or woman should be treated with the same dignity, confidentiality, kindness, and excellence of health care that are due any patient." *Id.* at 9 (emphasis added). *See also id.* at 278.

B. The Counseling Considerations

Both Ohio and Minnesota emphasize a need to protect teenagers from making an uninformed decision to terminate a pregnancy. *See, e.g., Minn. Br.* at 32; *Ohio Br.* at 13 ("state's interest [is] in protecting a minor from the

¹⁷ Only one percent of Planned Parenthood affiliates, 10 percent of public health departments and other providers and 19 percent of hospitals required parental consent or notification. *Id.* at 155. More agencies require parental consent or notification for teenagers under 15 years of age. The figure for private physicians is lower: 59 percent of a national sample of physicians (including obstetrician-gynecologists, general practitioners and pediatricians) were willing to provide services to unmarried minors without parental consent. *Risking the Future* at 156-57. Physicians were less likely to serve minors without requiring parental consent in states which had not enacted legislation permitting minors to provide their own consent. *Id.* at 157. *Citing Orr, Private Physicians and the Provision of Contraceptives to Adolescents*, 16 *Fam. Plan. Persp.* 83 (1984).

long range consequences of an ill-advised abortion decision"). Relying heavily on Justice Stewart's comment in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (concurring opinion), that "[i]t seems unlikely that [a teenage girl] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place,"¹⁸ both states suggest that parental notification helps ensure that a pregnant teenager has been adequately counseled prior to the abortion procedure. *See Minn. Br.* at 35; *Ohio Br.* at 27 (unlikely that minor will obtain adequate counsel from clinic).

The Panel's research does not support the assumption that non-parental counseling, particularly that of abortion providers, will necessarily be inadequate. The Panel found abortion clinics typically provide extensive counseling:

All clinics make abortion counseling available on request; such counseling generally consists of describing the procedure and explaining its risks, obtaining informed consent, and confirming that it was the patient's own decision to have the procedure. [One researcher] reports that 90 percent of clinics routinely counsel all first-abortion patients; 88 percent of clinics provide decision counseling to help a young woman explore the various factors that are involved in making an informed decision about the termination of her pregnancy. Nonprofit clinics appear to place greater emphasis on counseling than for-profit facilities. As a matter of policy, 68 percent of clinics provide a pregnancy test before per-

¹⁸ Justice Stewart's sweeping conclusion is based on an excerpt from the record in *Bellotti v. Baird*, 428 U.S. 132 (1976), describing the counseling procedures in one abortion clinic. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. at 91 n.2. The empirical evidence suggests that the procedures described in *Bellotti* may not be representative of the counseling generally provided to pregnant minors.

forming an abortion, even when a test has been provided elsewhere. In addition, 93 percent routinely provide a post-abortion clinic visit.

Risking the Future at 191-92. "Adherence to principles of voluntarism and informed consent" requires family planning/abortion clinics to engage in comprehensive counseling, embracing "an account of the possible risks, benefits, and consequences of maternity and abortion, the available alternatives, including adoption, and the resources available for needed care." *Id.* at 174. Thus, the evidence compiled by the Panel does not support the presumption that non-parental counseling available to minors seeking to terminate an unwanted pregnancy is inadequate.

IV. PARENTAL NOTIFICATION REQUIREMENTS IMPOSE SUBSTANTIAL, UNJUSTIFIED BURDENS ON PREGNANT MINORS

As discussed above, in the opinion of these *amici*, the relevant scientific literature does not provide support for the proposition that parental notification or consent requirements actually foster familial communication, are necessary to reduce the likelihood of adverse psychological consequences to pregnant minors or contribute substantially to the minor's ability to make an informed decision about abortion. There is, however, one measurable effect of consent or notification provisions—delay and increased burden for the pregnant minor who seeks to obtain an abortion. *Id.* at 194.

A. Notification Requirements Result In Delays Which May Lead To Increased Health Risks

Where performed early in a pregnancy, abortion is a relatively safe procedure. Little risk of medical complications attaches to abortions performed by qualified professionals in the first trimester of pregnancy. *Id.* at 278. The health risks associated with early, legal abortions are

no greater for adolescents than for adults and generally appear to be lower. *Id.* at 125, 278.¹⁹

Delays in seeking advice about pregnancy termination or in obtaining an abortion can have adverse consequences, however. *Id.* at 194, 277. For instance, in *Hodgson v. Minnesota*, 648 F. Supp. 756, 765 (D. Minn. 1986), the Court found as a matter of fact that "[e]ven delays of less than one week may push a woman into the second trimester. Second trimester procedures entail significantly greater costs, inconvenience, and risk." 648 F. Supp. at 765.

Ironically, the delays associated with notification or consent requirements have an especially devastating effect on the very class of individuals that such procedures are intended to protect. As a group, teenagers are far less likely than older women to obtain abortions during the first trimester of their pregnancies. *Risking the Future* at 114. The younger the pregnant minor, the more likely she is to delay. According to one source, 34 percent of abortions to girls age 15 and younger are performed during the first eight weeks of gestation, compared with 41 percent of abortions among girls ages 15-19 and 51 percent of those among women ages 20-24. *Id.*²⁰ The delay has been attributed to the inability of teenagers, particularly younger teenagers, to recognize the signs of pregnancy or to distinguish them from normal menstrual irregularities. Teenagers also tend to deny that they are pregnant. *Id.*

Whatever the reason for the initial delay, statutorily imposed parental notification requirements appear to exacerbate a troublesome situation by increasing the like-

¹⁹ By contrast, the health risks of pregnancy and child birth are substantially higher for very young mothers than for adult women. See generally *id.* at 123-125.

²⁰ Citing Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

likelihood that a pregnant teenager will delay obtaining an abortion. *Id.* at 194, 278. The requirements (or the perception of such requirements) are thought to inhibit some teenagers from seeking and obtaining abortions. *Id.* at 114. In addition, the statutory schemes typically impose waiting periods after parental notification has been accomplished. For instance, the statute enacted by the Minnesota legislature requires that both parents be given forty-eight hours written notice, with notice commencing at the time of delivery or on the next day, if notice is mailed. Minn. Stat. § 144.343. The trial court found that this procedure delayed the minor's abortion by at least forty-eight hours or more commonly seventy-two hours. *Hodgson v. State of Minnesota*, 648 F. Supp. 765, (D. Minn. 1986). The Ohio legislation requires that notification be provided to parents at least twenty-four hours prior to the abortion. Ohio Rev. Code Ann. § 2919.12(B)(1)(a)(i) (1989).

Moreover, as discussed above, many teenagers who do not voluntarily consult with their parents choose to use a judicial bypass proceeding rather than to comply with the notification provision. *Risking the Future* at 192. Judicial bypass proceedings allow a minor to establish that she is mature enough to make the decision without consulting her parents or to establish that parental consultation would not serve her best interests.²¹ Minors who avail themselves of the judicial bypass alternative to parental notification are often found to be mature. *Id.* at 195. For those minors deemed immature, abortions are almost always found to be in their best interest. *Id.*²²

²¹ To serve the best interests of minors, the proceeding should be expeditious, confidential and accessible.

²² In Massachusetts, for example, between April 1981, when the consent statute took effect, and February 1983, about 1,300 minors sought an abortion through the judicial bypass procedure. In 90 percent of the cases the minor was judged to be

A judicial bypass proceeding may require the minor to travel to another jurisdiction and wait for some period prior to obtaining access to the courts. *Id.* See *Hodgson v. Minnesota*, 648 F. Supp. at 763 (initial stages of proceeding may take a week or more; minor may need to travel to another jurisdiction). In the case of the Ohio proceeding, delays of twenty-two days are likely. *Akron Center for Reproductive Health v. Slaby, et al.*, 854 F.2d 852, 867 (6th Cir. 1988). Delays of this magnitude, especially when combined with some pregnant teenagers' delays in recognizing or taking decisive action when confronted with an unwanted pregnancy, could result in postponement of the abortion until the second trimester.

B. The Delay Caused By Parental Notification Statutes Disproportionately Burdens Minors Because Of Their Limited Access To Abortion Facilities

Teenagers generally have less access to abortion providers than do adult women. *Risking the Future* at 114.²³ Geographical constraints as well as costs hinder minors seeking abortion services. *Id.*²⁴ *Hodgson v. Minnesota, supra*, 648 F. Supp. at 761.

mature; in the remaining cases, all but five requests for abortions were approved, according to the best interest standard. In three of the cases denied, the trial court's decision was overturned on appeal; in one case the judge invited the minor to seek approval from another judge, who granted the petition; and in the last case the minor decided to go to a neighboring state for an abortion (Mnookin, 1985). Similar findings have been reported in Minnesota (Donovan, 1983).

Risking the Future at 195.

²³ Citing the Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (1981).

²⁴ The district court in *Hodgson* found that 94% of the counties in Minnesota had no readily available abortion providers and that virtually all of the abortion providers in Minnesota were located in Duluth or Minneapolis-St. Paul. 648 F. Supp. at 761.

Where the delay imposed by parental notification requirements results in postponement until and within the second trimester, access to abortion services becomes even more limited. One study reviewed in *Risking the Future* found that while seventy-two percent of abortion providers surveyed will perform an abortion at ten weeks, only thirty-two percent will perform one at thirteen weeks, twenty-one percent at fifteen weeks and only five percent at twenty-one weeks. Eighty-two percent of abortion providers do not perform abortions after the first trimester. *Risking the Future* at 191. Given many minors' already limited access to abortion services, any delay that causes postponement until the second trimester could prevent the minor from exercising her right to obtain an abortion.

Second trimester abortions also are substantially more expensive than first trimester abortions.²⁵ *Id.* at 193. See also *Hodgson v. Minnesota*, *supra*, 648 F. Supp. at 761. The increased cost of a second-trimester abortion may prove to be an insurmountable barrier for a pregnant minor. See *Risking the Future* at 114 (geographical distances and costs limit teenagers' access to abortion, especially school-age girls and those from poor families).

In sum, it is the conclusion of these *amici* that parental notification requirements impose substantial and unwarranted burdens on pregnant adolescents by causing delay and postponement of the minor's abortion. These delays not only result in increased health risks but may create insurmountable barriers due to the decreased availability of abortions after the first trimester.

²⁵ In 1981, hospital charges for abortions averaged \$735, as opposed to \$227-\$230 in 1983 for non-hospital facilities. *Risking the Future* at 193.

CONCLUSION

Amici urge the Court to assess the claims of the parties in light of the findings set forth in *Risking the Future*. Specifically, *amici* believe that the scientific studies examined in *Risking the Future* do not support the claim that minors present an increased risk of psychological trauma or adverse medical consequences from abortions. The studies suggest to these *amici* that the statutes will not contribute to constructive intra-family communication. Nor is the available scientific literature consistent with claims that any delay that results from the restrictions will be insignificant. See Minn. Br. at 17; Ohio Br. at 37. To the contrary, it appears more likely that the delays in these notification proceedings will result in a higher degree of risk to the health of pregnant adolescents who ultimately obtain an abortion. To these *amici*, this burden of increased risk appears to outweigh any benefit to be derived from parental notification provisions.

Respectfully submitted,

HANNAH E.M. LIEBERMAN *
PAMELA H. ANDERSON
(Counsel of Record)
SHAW, PITTMAN, POTTS
& TROWBRIDGE
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8000
Attorneys for Amici Curiae

Dated: October 14, 1989

* Robin G. Hayutin, Leslie Stout Tabackman and Nancy Sherbow contributed to the preparation of this brief.

APPENDIX

APPENDIX

| | |
|-----------------------------|---|
| Eugene S. Bardach | Professor, School of Public Policy University of California, Berkeley |
| Davidson, Ezra C., Jr. | Chairman, Department of Obstetrics-Gynecology Drew University of Medicine & Science |
| Dryfoos, Joy G. | Independent Researcher & Writer |
| Daniel D. Federman | Professor of Medicine Harvard Medical School |
| Forrest, Jacqueline Darroch | Vice President for Research The Alan Guttmacher Institute |
| Furstenburg, Frank F., Jr. | Professor of Sociology University of Pennsylvania |
| Ginsburg, Herbert P. | Professor of Developmental & Educational Psychology Columbia University |
| Jessor, Richard | Professor of Psychology & Director, Institute of Behavioral Science University of Colorado |
| Jones, Judith E. | Associate Professor of Public Health Columbia University |
| Kessen, William | Higgins Professor of Psychology Yale University |
| John Modell | Professor of History Carnegie Mellon University |
| Starfield, Barbara | Professor of Health Policy and Pediatrics The Johns Hopkins University, The Johns Hopkins University School of Medicine |
| Whalen, Carol K. | Professor, Social Ecology University of California, Irvine |